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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

DEC 17 2004

Federal Communications Commission  
Office of Secretary

In the Matter of	)	EB Docket No. 02-21
	)	
<b>PENINSULA COMMUNICATIONS, INC.</b>	)	
	)	
Licensee of stations	)	File No. EB 01-IH-0609
KGTL, Homer, Alaska;	)	FRN: 0001-5712-15
KXBA(FM), Nikiski, Alaska;	)	Facility ID Nos. 52152
KWVV-FM, Homer, Alaska; and	)	86717
KPEN-FM, Soldotna, Alaska.	)	52145
	)	52149
	)	
Licensee of FM translator stations	)	
K292ED, Kachemak City, Alaska;	)	52150
K285DU, Homer, Alaska;	)	52157
K285EG and K272DG, Seward, Alaska	)	52158 and 52160
	)	
Former licensee of FM translator stations	)	
K285EF, Kenai, Alaska;	)	
K283AB, Kenai/Soldotna, Alaska;	)	
K257DB, Anchor Point, Alaska;	)	
K265CK, Kachemak City, Alaska;	)	
K272CN, Homer, Alaska; and	)	
K274AB and K285AA, Kodiak, Alaska	)	

To: The Commission

**COMMENTS OF KSRM, INC.**

KSRM, Inc. ("KSRM"), by its attorney, hereby respectfully submits its comments on a "Request to Reopen the Record and for Official Notice" ("Request") filed by Peninsula Communications, Inc. ("PCI") on December 14, 2004.

PCI's Request seeks to draw the Commission's attention to a section of the "Satellite Home Viewer Extension and Reauthorization Act of 2004" which appears to amend Sections

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307 and 312(g) of the Communications Act of 1934.<sup>1</sup> Significantly, though, while requesting that official notice be taken, PCI does not even attempt to suggest how the new provisions might be relevant to this case. PCI can hardly be faulted for its wholly abstract approach, as the law itself defies comprehension and in any event seems utterly irrelevant to the panoply of problems PCI has brought upon itself and yet successfully managed to evade over the past decade. Thus, while the new provisions are unintelligible and problematic, the overall issues can be sidestepped in the present case.

As a general matter, the new law is replete with internal contradictions and resists rational application to FCC-regulated entities. Thus, Section 307(f) appears to permit any holder of a broadcast license to use any facility at all to reach certain areas of Alaska. Presumably, this would permit a Puerto Rican LPFM operator to commence one megawatt operations on any Alaskan frequency it wishes, so long as at least a slim portion of its signal reaches a remote as-yet unserved area. While the same provision purports to apply only to areas that do not have “access” to broadcasts via any alternative signal delivery, it is unclear how any area of Alaska could possibly qualify under such a standard, given the huge footprint of satellite transmission

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<sup>1</sup> The provisions of concern are as follows:

(2) In section 307, by adding at the end the following new subsection:

‘(f) Notwithstanding any other provision of law, (1) any holder of a broadcast license may broadcast to an area of Alaska that otherwise does not have access to over the air broadcasts via translator, microwave, or other alternative signal delivery even if another holder of a broadcast license begins broadcasting to such area, (2) any holder of a broadcast license who has broadcast to an area of Alaska that did not have access to over the air broadcasts via translator, microwave, or other alternative signal delivery may continue providing such service even if another holder of a broadcast license begins broadcasting to such area, and shall not be fined or subject to any other penalty, forfeiture, or revocation related to providing such service including any fine, penalty, forfeiture, or revocation for continuing to operate notwithstanding orders to the contrary.’.

(3) In section 312(g) [*i.e.*: mandating expiration of the license of any broadcast station not operated for 12 consecutive months], by inserting before the period at the end the following: ‘, except that the Commission may extend or reinstate such station license if the holder of the station license prevails in an administrative or judicial appeal, the applicable law changes, or for any other reason to promote equity and fairness. Any broadcast license revoked or terminated in Alaska in a proceeding related to broadcasting via translator, microwave, or other alternative signal delivery is reinstated’.

nowadays.<sup>2</sup> Subsection (2) would appear to immunize any party operating under color of subsection (1) from any Commission enforcement action whatsoever.

Such problems of interpretation are only magnified in the revision to Section 3.12(g) of the Communications Act. The first of the two sentences **permits** the FCC to reinstate a previously cancelled license under any of three specific situations, whereas the second sentence **requires** reinstatement, no matter what the underlying circumstances might have been and despite any other independent reason for refusing licensure. The incompatibility and impracticality of these awkward and opaque provisions strongly suggests that they were slapped on to unrelated litigation at the last minute, without the benefit of any meaningful thought or even proofreading. Unfortunately, but consistent with such origins, there appears to be no legislative history whatever to guide the Commission and others in attempting to understand these laws or the intent of their authors. Indeed, not only was this matter never proposed, discussed or aired for public comment, but it would appear that the Commission was never even notified of such a potentially massive change in its authority and practice.<sup>3</sup> The absence of any record or input from the affected agency, industry or the public is truly astounding for legislation which, if read literally (as is required in the absence of interpretive explanation), effectively strips the FCC of any ability to oversee broadcasting in Alaska, thus turning the regulatory clock back nearly a century to the pre-FRC days of broadcast anarchy. Under the new law, it would

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<sup>2</sup> It is worth noting the construction of this provision. Had it been intended to permit broadcasting via translator, microwave or other alternative signal delivery, it would have read: "Any holder of a broadcast license may broadcast via translator, microwave or other alternative signal delivery to an area of Alaska that does not otherwise have access to over the air broadcasts..." But it does not. Instead, the phrase "via translator, microwave or other alternative signal delivery" follows without commas, and therefore directly modifies, the clause "an area of Alaska that otherwise does not have access to over the air broadcasts." Thus, the plain meaning of this provision is that any type of broadcasting is permitted so long as an area reached does not have access to over the air broadcasts via any other means. The phrasing of subsection (f)(2) is consistent with, and thus supports, this reading.

<sup>3</sup> Indeed, as of this date, undersigned counsel has read nothing of this legislation in any of the many trade publications to which his office subscribes. Undersigned counsel first became aware of this matter only through the courtesy of another attorney in the cases below who, significantly, had been sent a copy of this legislation in an apparent gesture of bravado by PCI's attorney, thus leaving little doubt as to the driving force behind it.

appear that the licensee of any broadcast facility, no matter how fraudulently obtained, or in which the most horrible miscreant holds an attributable or even a controlling interest, now is to be held in perpetuity, permanently immune from the FCC's licensing process.<sup>4</sup>

Fortunately, the Commission need not concern itself with such dire prospects in the instant case, since these provisions, by their very terms, are utterly inapplicable to the captioned matter.

Section 307(f), by its terms, applies to parties serving (at least in part) unserved areas. The *Initial Decision* in this case, FCC 03D-01, released June 19, 2003 revoked the licenses of KWVV-FM, Homer and KPEN-FM, Soldotna. Yet, at the time KPEN-FM first became licensed in 1984 (BLH-19841219LM), station KSRM(AM), Soldotna, had been broadcasting for over 17 years. Similarly, when KWVV-FM was first licensed in 1979 (BLH-19790912AE), KBBI(AM), Homer, was in operation.

A similar situation pertains to the four captioned translator stations which illegally encroach KSRM's markets and which KSRM had previously protested.<sup>5</sup> Thus, K285EG and K272DG, Seward, each arose through initial applications filed in 1991 (BPFT-910513TG and BPFT-910513TH, respectively) even though Seward (and the translators' entire coverage areas) have enjoyed local radio service from KSWD(AM), since November 1948. Similarly, K285EF arose in 1991 (BPFT-910513TF), although Kenai has been served by KWHQ-FM since 1976. Finally, K283AB, Soldotna arose through a 1982 application (BPFT-820414IA) although KSRM(AM) has been licensed to that community since 1967 (and, ironically, PCI's own KPEN-FM had been operated there between 1984 and its recent demise).

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<sup>4</sup> Or, to add to the already severe confusion, perhaps the second sentence mandates reinstatement but then permits the Commission to commence new revocation proceedings immediately thereafter, a patent waste of resources.

<sup>5</sup> KSRM's initial participation in this matter arose through the filing of letters and a formal petition to deny the 1996 license renewals of PCI's K285EF, Kenai, K283AB, Soldotna and K272DG and K285EG, Seward.

Nor would the amendment to Section 312(g) of the Communications Act appear to benefit PCI. The first sentence only applies in three circumstances, none of which involves PCI. The first is where the holder prevails in an administrative or judicial appeal. In fact, despite numerous and varied attempts, PCI has compiled a perfect record of appellate *defeats*.<sup>6</sup> The second trigger is changes in the applicable law, but any extension or reinstatement of its licenses which PCI might now seek are not at all prompted by changes in the law; rather, all of its numerous infractions, as well as its period of sustained defiance of prior Commission orders, occurred under laws that have remained in effect and unchanged for the past decade.<sup>7</sup>

The final ground upon which the first sentence of Section 312(g) permits the Commission to extend or reinstate a license is “any other reason to promote equity and fairness.” It would be truly astounding for PCI to claim that factors of equity and fairness favor the relief it seeks. The Commission is familiar with the history of this matter, as it is outlined in numerous pleadings filed in the heavily-contested PCI translator license renewals and assignments leading up to the captioned case, and are further summarized at Paragraphs 20-46 of the *Initial Decision*. Yet, the question of fairness is indeed relevant here, as it pervades and transcends the constant legal maneuvering of PCI, which has consistently reaped illegal profits through a steadfast refusal to comply with the same legal requirements which KSRM and PCI’s other competitors have respected.<sup>8</sup>

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<sup>6</sup> See, e.g., Peninsula Communications, Inc. v FCC, DC Cir. No. 01-1273, *per curiam Judgment and Memorandum*, filed January 30, 2003; United States of America v. Peninsula Communications, Inc., 287 F 3d 832 (9<sup>th</sup> Cir. 2002).

<sup>7</sup> The most recent change in the translator laws took effect in March 1994; there have been no changes in the law since then.

<sup>8</sup> Thus, when the revised translator rules took effect on March 1, 1994, KSRM voluntarily relinquished the license for its Homer translator, K252CF, which no longer complied with FCC service limitations that translators no longer extend the signal of their primary station into other stations’ markets; indeed, in a January 16, 1997 letter, the Chief of the Audio Services Division, Mass Media Bureau had expressly invited KSRM to file a renewal application for K252CF, but KSRM declined so as to abide by applicable law. Even so, in a February 5, 1997 responsive letter, KSRM pointedly noted that if for any reason PCI were to be permitted to continue to operate translators beyond the coverage areas of its primary stations, then it would only be fair for KSRM to obtain similar relief, so as to obtain a

The issue of fairness is paramount to competitors who have suffered over the past decade as a result of PCI's illegal operations. Submitted herewith is a statement from John C. Davis, KSRM's President. Therein, Mr. Davis recounts the damage PCI has done to competition and expresses the outrage that he and other lawful operators in Alaska have felt over PCI's activities, feelings that are only intensified by PCI's latest attempt to escape unscathed with the spoils of its deplorable actions.

To complete the analysis of how the addition to Section 312(g) is unavailing to PCI, the second sentence states that it applies only to licenses that already have been revoked or terminated. This proceeding, however, remains pending before the full Commission on exceptions to the *Initial Decision*. While operation of certain PCI stations may be suspended under court injunction, the licenses themselves have not yet been revoked or terminated. That will only follow a Commission decision. Thus, PCI cannot benefit from this provision.<sup>9</sup>

In determining how to implement the new provisions, the Commission must remain cognizant of a further overriding factor to which Mr. Davis alludes and that transcends the concerns of this particular case. The Commission has neither the budget nor the inclination to minutely police every aspect of its licensees' operations and activities. Rather, it depends largely upon the fact that licensees are expected to abide by applicable regulatory requirements without incessant monitoring. For a licensee such as PCI to openly defy the FCC, derogate its legitimate competitors, and then, when finally threatened with a well-deserved (if sadly belated) outcome,

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comparable financial benefit. Yet, while continuing to tolerate PCI's illegal operations, the Commission took no initiative toward granting comparable relief to KSRM. Instead, despite repeated requests that PCI be required to cease its illegal operations, which were draining substantial revenues from the markets which KSRM was serving legally, the Commission effectively took no action to compel PCI's adherence to the law for several more years.

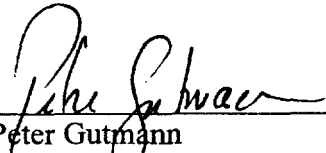
<sup>9</sup> Nor, ironically, can PCI hope to benefit from this provision in the future, since it is phrased entirely as a one-time present directive, such that a license presently revoked or terminated in Alaska is now reinstated, and has no apparent applicability to other licenses that may be revoked or terminated at some later point.

resorts to a back-handed political maneuver, this sends a terribly inappropriate signal to the industry.

The captioned matter has been perhaps the most visible case in recent times in which a private party has chosen to pit itself against the full force of regulatory authority. Although justice was slow, it finally arrived. For PCI now to succeed in its latest maneuver would be a shameful development, both for the Commission and for the entire communications industry, as it would profoundly erode the basis of respect and integrity with which broadcasters are expected to regard and uphold the regulatory process.

Respectfully submitted,

**KSRM, INC.**

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December 17, 2004

## STATEMENT UNDER PENALTY OF PERJURY

John C. Davis states under penalty of perjury that the following is true and correct to the best of his knowledge and belief:

After review of this new law concerning Alaska broadcasting at the end of the Satellite Home Viewer Extension and Reauthorization Act of 2004, I am simply overwhelmed by what appears to be a serious mistake. I just can't imagine that any Senator or Congressman would even consider adding this type of specialized legislation. It over-rides not only the Federal Communications Commission but the Federal District Courts, as well, in their pursuit of one individual radio station owner who has "thumbed his nose" at both, for eight long years and continued to operate in outright defiance of the rules and regulations under which all other broadcasters in the nation must operate.

You can imagine how I feel as a competitive AM/FM broadcaster here on the Kenai Peninsula, who obeyed the FCC deadline to "shut down" all FM translators outside the service area of their primary station in 1994, and then find Peninsula Communications on the air the next morning and every morning for over eight years with all eight of their illegal translators. My FM Translator was located in Homer, some 75 miles south of my AM/FM full-service stations in Kenai/Soldotna. This translator for KWHQ FM (KQOK) was on the air long before either of the Peninsula Communications full-service Stations KWVV FM and KGTL or their legal translators (within primary service area stations) were even on the air in Homer, Alaska. And yet, abiding by FCC Rules and Regulations, I obediently shut down my Homer translator, even though it meant the loss of considerable monthly revenue from Homer. Yet, Peninsula Communications, whose translators in my markets and throughout the Kenai Peninsula went on the air well after full-service stations in those areas, continued to operate, even though the same rule I obeyed applied to them as well. As a result, for nearly a decade I and other law-abiding broadcasters were forced to compete against a "super station network" that reached listeners throughout the Kenai Peninsula while we were able to claim listenership and advertising dollars only in the markets covered by our AM and FM stations.

Although it took many long years, the FCC finally moved to shut down the illegal Peninsula Communications "out of primary service area" translators. Peninsula Communications still told them no way! They didn't care about the law and were going to operate all eight of them anyway. Even FCC fines levied in the amount of \$140,000 on Peninsula Communications had no effect. Finally, the Federal Marshal did cause all of the illegal translators to be shut down and they are off the air now. The eight illegal translators included two in Kodiak, re-broadcasting KWVV FM/Homer and KPEN FM/Kenai, two in Kenai/Soldotna, re-broadcasting KWVV FM/Homer, two in Seward, broadcasting KWVV FM/Homer and KPEN FM/Kenai, and two in Homer, re-broadcasting KPEN FM and KXBA FM from Kenai.

Over the past ten years, the FCC has spent huge numbers of dollars and hours of time to try and bring about equal and fair competition by making Peninsula Communications operate, as directed, under their Rules and Regulations. Court hearings in Washington D.C. with testimony, by a number of Alaska Broadcasters affected by the illegal translators, left a complete record of "under oath testimony" on all the transgressions of Peninsula Communications and their continued operation of illegal translators in the many communities outside of their "primary coverage" areas. All of the operators of full-service AM/FM Radio stations in all of the affected communities testified that Peninsula Communications was able, over an eight year period of



illegal operation as a "Super Station" with their illegal translators, to siphon off over \$3 million in advertising from legitimately operated full-service stations.

Translators operate for only \$200 - \$300 per month with no employees while full-service stations pledged to serving the community needs in their primary service areas often have a monthly overhead of from \$60,000 to \$80,000. The "Super Station" image that Peninsula Communications pitched to local clients and advertising agencies, as reaching a huge area population, caused advertising orders that often by-passed the local full-service stations who had shut down their out-of-market translators according to FCC Rules.

The new law appears to be a direct slap in the face of all broadcasters like myself who bend over backwards to comply with FCC edicts. Its specialized language, strictly for the benefit of Peninsula Communications (seemingly the only broadcaster in the state for whom the language would apply), allows them to come out of years of unfair and illegal translator operation with no penalty whatsoever. Furthermore, the new law allows them to continue to disobey the FCC Rules and Regulations and continue with their illegal translator super station status forever.

This is so blatantly unfair and disrespectful of all legitimate, legal and dedicated full service local broadcasters all across America, as well as the Federal Communications Commission, that it is totally unbelievable. How can any of us be expected to have any further respect for the FCC or the laws by which it requires broadcasters to operate when those who openly and continually defy those laws not only escape any penalty but are richly rewarded with keeping all the profits earned by their illegal conduct? Worse, those illegal profits were taken from the pockets of legitimate broadcasters in the form of advertising dollars siphoned from our markets, where Peninsula Communications had no right to operate translators. If they had incurred the expense and obligations of a full-service broadcaster, I would welcome them to compete with me on a level playing field, but they had an unfair advantage by using translators that avoid such expenses and responsibilities to their communities.

This newly passed law with a subsection designed to protect only one broadcaster in Alaska is special interest legislation at its very worst. It defies all logic and common sense. Alaska's legislative delegation is no longer above reproach and the originator of this despicable piece of legislation has certainly lost all respect not only from this broadcaster but many others, if not all, local full-service broadcasters across Alaska. The damage this subsection will cause to the image of the Federal Communications Commission and their enforcement of their Rules and Regulations will be hard to overcome, and damage to those of us who must now compete with low-cost, high revenue producing illegal translators will be devastating for years to come and may perhaps permanently impair our ability to continue to provide our communities with a commitment of meaningful local service.

Hopefully, when our Alaska Senators and Congressman become aware of this mistake, corrective legislation will be introduced immediately. We will work through the Alaska Broadcasters Association, to that end. But until then, I look to the FCC to restore our confidence in the basic principle that competitors should be required to abide by the same basic rules and that those who break the rules should not be rewarded for their defiance.

December 17, 2004

 12-16-04

John C. Davis, President, KSRM Inc.

**Certificate of Service**

I, Peter Gutmann, an attorney in the law firm of Womble Carlyle Sandridge & Rice, PLLC, do hereby certify that I have on this 17<sup>th</sup> of December, 2004, caused copies of the foregoing Comments of KSRM, Inc. to be mailed to the following by first-class United States mail, postage prepaid:

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The Honorable Jonathan S. Adelstein  
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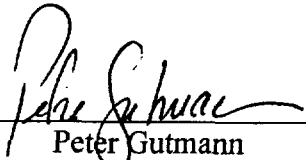
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